

No. 77-257

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH B. BERGEN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, a former Air Force Reserve lieutenant colonel, became subject to involuntary retirement in September 1972 because he had not been selected for promotion to the reserve grade of colonel (see 10 U.S.C. 8848). Petitioner applied to the Air Force Board for the Correction of Military Records (AFBCMR) to change his date of promotion to lieutenant colonel from April 1970 to before July 1969, arguing that prior to the latter date he had met the requirements for an "out-of-sequence" promotion to lieutenant colonel to fill a "unit and mobilization augmentation grade vacancy" (Pet. App. A 23).¹ Petitioner requested this correction because

¹Petitioner received an "in sequence" promotion to lieutenant colonel. In order to avoid mandatory retirement, however, he would have had to be promoted at an earlier date, pursuant to special provisions for "out-of-sequence" promotions (see 10 U.S.C. 8372(b), (d), 8366(d)).

otherwise he could not claim that he should have been considered for promotion to colonel before September 1972, since he would not have served sufficient time in the rank of lieutenant colonel to be eligible for promotion. See 10 U.S.C. 8363(a)(4).

The AFBCMR advised petitioner that he had failed to establish a showing of probable error or injustice (Pet. 5) and it subsequently denied his application for reconsideration (Pet. 6). Petitioner thereafter brought this action in the Court of Claims, seeking reinstatement, back pay, and an order directing the Air Force to convene a special board to consider him for promotion to colonel. The Court of Claims dismissed the action, finding that the AFBCMR's factual determination that petitioner had not met the requirements for out-of-sequence promotion before June 1969 was supported by substantial evidence and was not arbitrary or capricious (Pet. App. A).

1. Petitioner argues that only an improper delay in informing him of his placement on a recommended list for promotion to lieutenant colonel kept him from achieving that rank before July 1969 (Pet. 6-7, 12). He claims (Pet. 12-16) that if he had been informed of his placement on this list on or shortly after June 2, 1969—the first date that persons on the list were permitted to be informed of their status (see Pet. App. C. 39)—he would have been able to meet the other requirements for an

out-of-sequence promotion in time to be promoted to lieutenant colonel before July 1, 1969.²

Both the AFBCMR and the Court of Claims, however, determined that petitioner had not demonstrated that he could have met the requirements for out-of-sequence promotion in time to qualify for promotion to lieutenant colonel before July 1, 1969 (Pet. App. A 25-27). Air Force regulations required petitioner to meet all the requirements for promotion 30 days prior to the meeting of the relevant selection board. Air Force Manual 35-3, ch. 23, para. 23-5(a), note (Pet. App. B 34).³ In this case, that board met on June 19, 1969, so that May 20, 1969, was the last date by which respondent could have satisfied the requirements in time for promotion. The court concluded that petitioner

²The requirements for out-of-sequence promotion are (Pet. App. A 25-27):

1. Officer's name must be on a recommended list for promotion to Lieutenant Colonel;
2. He must be filling the vacancy slotted for the higher rank (or be assigned to the same unit or Major Command); and
3. He must be recommended for promotion to Lieutenant Colonel by the commander of the unit having the vacancy or if not occupying the vacancy slotted for higher rank, he must be recommended for promotion and to the particular slot by the commander of the unit having the vacancy.

See also Air Force Manual 35-3, ch. 23 (Pet. App. B).

³Petitioner contends (Pet. 14) that the 30-day requirement does not apply to out-of-sequence promotions. By its terms, however, the requirement applies to promotions generally without qualification or exception, and the Air Force construes it to apply to out-of-sequence promotions. There is no reason to depart from this construction (see *Udall v. Tallman*, 380 U.S. 1, 16), which facilitates preparation for selection board meetings.

had not met two of the three requirements for out-of-sequence promotion by May 20, 1969 (Pet. App. A 25-26)⁴ and further that he had no reason even to attempt to meet these requirements prior to that date, since he could not have learned prior to June 2, 1969, that he was on the recommended list (Pet. App. A 27). The Court of Claims therefore rejected petitioner's claim that he could have been promoted before July 1, 1969, if notified of his placement on the recommended list on or shortly after June 2, 1969. The factual determinations underlying this conclusion do not warrant further review.

2. Petitioner incorrectly contends (Pet. 19-20) that the court below failed to follow this Court's decision in *United States v. Testan*, 424 U.S. 392, in that it failed to consider whether there was "legal error" by the Air Force in not informing petitioner immediately of his placement on the recommended list as of June 2, 1969. The Court of Claims simply had no occasion to consider whether any delay in so informing petitioner violated Air Force regulations or otherwise infringed upon petitioner's substantive rights, for the delay did not cause petitioner any injury: petitioner would not have met the requirements for promotion in time to be promoted by July 1, 1969, even if he had been notified on June 2 of his placement on the recommended list.

⁴On May 20, 1969, petitioner was not assigned to the unit or Major Command that had the vacancy, and he had not been recommended by the Commander of the appropriate unit. The court concluded it did not need to decide whether his name was on the recommended list prior to May 20, since petitioner clearly failed to meet two of the three requirements for out-of-sequence promotion (Pet. App. A 25-26).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.